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August 15, 2007

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AUG 15 2007

Federal Communications Commission
Office of the Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Special Access Rates for Price Cap Local Exchange Carriers
(WC Docket No. 05-25); AT&T Corp. Petition for Rulemaking to Reform
Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special
Access Services (RM-10593)

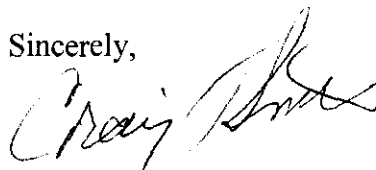
Dear Ms. Dortch:

Enclosed for filing are two copies of the REDACTED FORM FILING in the above-referenced matter.

Please acknowledge receipt of this filing by date stamping the extra copy of this cover letter.

Thank you for your attention in this matter. If you have any questions regarding this filing, please do not hesitate to contact me at 913.345.6691.

Sincerely,



Craig T. Smith

CTS:kmm
Enclosures

REDACTED - FOR PUBLIC INSPECTION

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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To Reform Regulation of Incumbent)	
Local Exchange Carrier Rates for)	
Interstate Special Access Services)	

REPLY COMMENTS OF EMBARQ

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August 15, 2007

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SUMMARY

The incumbent local exchange carriers (ILECs) that are the target of efforts to re-regulate and restrict special access pricing and offerings produced extensive evidence that clearly and convincingly demonstrates that competition is abundant and expanding rapidly in special access markets. Once again, however, those calling for re-regulation and oppressive new regulation have provided essentially no evidence to support their claims, despite the fact that they should have the burden of proof. Instead they continue to rely on ARMIS data that the Commission has already recognized is flawed for this purpose and to offer backward-looking allegations about the lack of alternative competing providers.

The record simply will not sustain even one of the re-regulation steps requested by some of the purchasers of special access: elimination of Phase II pricing flexibility, reinitialization of rates, adoption of an X-Factor, adoption of fresh look options, or adoption of baseball style arbitrations. Critically, if the Commission were inclined to impose one of these radical changes despite the wealth of information demonstrating robust competition, there is still a substantial gap in the record because the Commission has not required the purchasers seeking these unjustified and even confiscatory price reductions in special access services to produce the necessary information on the deployment of facilities in competition with ILEC special access services. Moreover, competing providers of special access services have not voluntarily provided the necessary information.

The record, especially as supplemented herein, also demonstrates that rates are, in fact, not unjust and unreasonable. Accordingly, the Commission should not, and indeed, legally cannot mandate the requested rate reductions.

Embarq demonstrates in these reply comments that: (1) the complaints do not provide any basis for Commission action against Embarq because they focus primarily on the large integrated BOCs and contain no specific complaints about smaller, and more rural ILECs; (2) alternative suppliers and technologies are present today; (3) the record is not and cannot be complete until the Commission receives data from all providers; (4) the service about which there are the most complaints—DS1 channel terminations—does not earn an excessive rate of return; (5) reinitialization of any special access rates based on this record would be unlawful and bad public policy; (6) the record does not support the re-imposition of a productivity factor; (7) the record does not support imposing any contract and tariff restrictions; and (8) the record supports eliminating the collocation-based pricing flexibility trigger in favor of one evidencing actual competition and shrinking the relevant geographic market from an MSA to a wire center.

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REPLY COMMENTS OF EMBARQ

The incumbent local exchange carriers (ILECs) that are the subject to calls for re-regulation and oppressive new regulation have come forth with extensive evidence that clearly and convincingly demonstrates that competition is abundant and expanding rapidly in special access markets. Indeed, the most recent comments provide a wealth of information regarding the degree of competition and viability of comparable alternatives to ILEC special access services. Once again, however, those calling for re-regulation and oppressive new regulation have provided essentially no evidence to support their claims.

In this case, the record simply will not sustain even one of the radical changes requested by some of the purchasers of special access: elimination of Phase II pricing flexibility,¹ re-initialization of rates,² adoption of an X-Factor,³ adoption of fresh look

¹ See e.g., Comments of Sprint Nextel Corporation, August 8, 2007 ("Sprint Nextel") at p. 7.

² See e.g., Comments of BT Americas Inc., August 8, 2007 ("BT Americas") at p. 21.

³ See e.g., Comments of T-Mobile USA, Inc., August 8, 2007 ("T-Mobile") at p. 15.

options,⁴ or adoption of baseball style arbitrations.⁵ Critically, if the Commission were inclined to impose one of these radical changes despite the wealth of competitive information provided by the ILECs that demonstrates competition is robust, there is still a glaring gap in the record because the Commission has not required purchasers seeking these unjustified and even confiscatory price reductions to produce the necessary information on the deployment of facilities in competition with ILEC special access that they know exist. If they had, the record would overwhelmingly demonstrate that their complaints are baseless. Moreover, competing providers—e.g., cable, CLEC, wireless (fixed and mobile), and WiMAX providers—have not voluntarily provided the necessary information about their facilities.

Rather than make their case,⁶ the comments filed by the purchasers of special access are entirely predictable. The purchasers complain that ILEC special access prices, are too high, especially for DS1 Channel Terminations.⁷ That the purchasers of special access want to pay less should not be a revelation to anyone. Purchasers of virtually all goods and services want more, and they want to pay less for it. However, the simple fact

⁴ See e.g., Comments of Paetec Communications, Inc. and US Lec Corp. August 8, 2007 ("PAETEC") at p. 18.

⁵ *Id.*

⁶ This is exactly the opposite of what is equitable and most consistent with legal mandates because it is those who seek regulation that should and generally do bear the burden of proof.

⁷ Interestingly, and contrary to their own case, those arguing for special access rate reductions also argue that they find it too expensive to build their own dedicated circuits in competition with special access services offered by ILECs despite the fact that many of them are large and sophisticated telecommunications carriers with substantial economies of scale and extensive experience building telecommunications facilities. The ILECs from whom they seek special access rate reductions also find it expensive to build dedicated special access circuits, which only goes to demonstrate that current rates are not, in fact, unjust and unreasonable.

that a purchaser wants more for less does not mean existing rates are unjust or unreasonable; nor should it serve as a basis for action by regulators. Instead, the record demonstrates that rates are, in fact, not unjust and unreasonable so the Commission should not, and indeed, legally cannot mandate the requested rate reductions.

Embarq demonstrates in these reply comments that: (1) the complaints do not provide any basis for Commission action against Embarq because they focus primarily on the large integrated BOCs and contain no specific complaints about smaller, and more rural ILECs; (2) alternative suppliers and technologies are present today; (3) the record is not and cannot be complete until the Commission receives data from all providers; (4) the service about which there are the most complaints—DS1 channel terminations—is not priced unjustly and unreasonably; (5) re-initialization of any special access rates based on this record would be unlawful and bad public policy; (6) the record does not support the re-imposition of a productivity factor; (7) the record does not support imposing any limitations on Embarq's contract and tariff terms, Embarq provides a discount plan that does not require circuit commitments; and (8) the record supports limited changes to the triggers for pricing flexibility.

I. THE COMPLAINTS DO NOT PROVIDE ANY BASIS FOR COMMISSION ACTION AGAINST EMBARQ BECAUSE THEY FOCUS PRIMARILY ON THE LARGE INTEGRATED BOCS AND CONTAIN NO SPECIFIC COMPLAINTS ABOUT SMALLER AND MORE RURAL ILECS.

There is nothing on the record to sustain a change to the current system of price cap and pricing flexibility (other than a change to the competition triggers and geographic market as urged by Embarq and parties on both sides of the dispute) or to revise or

eliminate the *CALLS Plan*.⁸ This is true for the industry as a whole, but especially so for Embarq and smaller, more rural ILECs. None of the complaining parties provided any specific complaints or specific information about Embarq and smaller ILECs.

Furthermore, neither Embarq nor most of the smaller ILECs have the incentives of integrated companies that have an ILEC affiliate that sells special access and a wireless affiliate that buys special access while competing with non-affiliated wireless carriers.⁹

Accordingly, Embarq agrees with ITTA which said:

The instant proceeding is not simply a policy dispute between the RBOCs on one side and wireless and competitive local exchange carriers (CLECs) on the other. Rather, regulation of special access would be contrary to public policy and would affect adversely mid-sized carriers whose operations are characterized by meeting competition with reasonable market-based rates.¹⁰

In addition to not having the alleged incentives of an “integrated company” to artificially inflate special access prices (which Embarq does not find to be a persuasive argument in any event), Embarq and other smaller ILECs face substantially different economic conditions than do the BOCs when it comes to special access services. As pointed out in the Declaration of Kent W. Dickerson (Attachment A), the territory of Embarq and other smaller ILECs is vastly different from the BOCs; comprised predominately of rural areas where costs to build are often high – especially when considering the low volumes of traffic generated in these rural areas. This difference

⁸ *Access Charge Reform*, 15 FCC Rcd 12962 (“*CALLS Plan*”) *aff’d in part, rev’d in part, and remanded in part*, *Texas Office of Public Util. Counsel v. FCC*, 265 F.2d 313 (5th Cir. 2001), *cert. denied*, *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002), *on remand*, *Access Charge Reform*, 18 FCC Rcd 14976 (2003).

⁹ Embarq was part of such an integrated company until it was spun off by Sprint Nextel in May 2006.

¹⁰ Comments of the Independent Telephone and Telecommunications Alliance, August 8, 2007, at p. 3.

impacts the ability and incentives of Embarq and smaller ILECs to engage in anti-competitive activities.

In the past, the Commission has recognized (a) that Embarq and other smaller ILECs are different; (b) that this difference has an impact on the ability and incentive to engage in anti-competitive behavior; and (c) that this difference requires different regulatory obligations. In *Amendment of Section 64.704 of the Commission's Rules and Regulations Computer II Final Decision*, 77 F.C.C.2d 394 (1980) ("*Computer II Final Decision*") the Commission determined that structural separation was not necessary in the provision of enhanced services for carriers, other than AT&T (which then included the BOCs) and GTE, largely because the smaller carriers, such as Embarq, could not engage in anti-competitive behavior in the nation-wide enhanced services market. The Commission wrote:

A carrier's ability and incentive to engage in anticompetitive conduct in adjacent markets must be measured with some recognition of the parameters of those markets. Thus, what must be recognized is that while market power in the provision of telephone service may be appropriately measured within both local and national geographic markets, the provision of enhanced services and CPE has been largely undertaken, and increasingly so, on a national basis. These services, in essence, are and will continue to be directed at residential and business users spread over broad geographical markets. A carrier such as AT&T, with a nationwide network of transmission systems and local distribution plant in major metropolitan areas, could obviously harm a competitor through its control over these facilities in an anti-competitive manner.¹¹

This same recognition that Embarq and the smaller ILECs cannot engage in anti-competitive behavior in the enhanced services market led the Commission in the

¹¹ *Computer II Final Decision*, p. 467, § 217.

*Computer III Phase II Order*¹² to refuse the imposition of CEI/ONA nonstructural safeguard obligations on any carriers other than AT&T and the BOCs: "...we decline at this time to apply the nonstructural safeguards established in the *Phase I Order* to the enhanced service operations of the Independents. We conclude that the ITCs are sufficiently different from the BOCs to warrant different regulatory treatment."¹³

Likewise, in the LEC Price Cap docket, which is directly relevant to these proceedings, the Commission treated Embarq and smaller ILECs differently from the larger ILECs. Although Embarq did, in fact, choose the route of price cap regulation, the critical fact is that the Commission recognized that the economic circumstances were different for Embarq and smaller ILECs and afforded them the *option* of choosing whether or not to go the price cap route. Price cap regulation was only mandatory for the BOCs and GTE.¹⁴ And, throughout the years the Commission has consistently placed fewer regulatory reporting obligations on smaller ILECs, including Embarq.¹⁵

The Commission should determine in these proceedings that no changes to the existing regulatory systems are needed for special access beyond the changes to the

¹² *In the Matters of Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Report and Order, 2 FCC Rcd 3072 (1987) ("*Computer II Phase II Order*").

¹³ *Id.*, at ¶ 8.

¹⁴ *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6787 (1990) ("*LEC Price Cap Order*")., *aff'd Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

¹⁵ In the *ARMIS Reductions Report and Order*, 14 FCC Rcd 11443 (1999) mid-sized ILECs were permitted to file financial ARMIS reports at a Class B level and in the *Accounting Reductions Report and Order*, 14 FCC Rcd 11396 (1999) mid-sized ILECs were allowed to submit CAMs based on Class B accounts.

triggers and geographic market used for pricing flexibility that Embarq and others have suggested. Nonetheless, should the Commission go further and impose re-regulation or oppressive new special access regulations, Embarq has proved in its comment and these reply comments that Embarq has neither the incentives nor excessive rates and earnings that would provide the necessary factual predicate for the Commission to take such action against Embarq. Accordingly, the Commission would have to recognize once again that key differences in incentives and abilities argue against placing onerous and unnecessary burdens on Embarq and smaller ILECs.

II. ALTERNATIVE SUPPLIERS AND TECHNOLOGIES ARE PRESENT TODAY.

Some purchasers of special access complain that they cannot find comparable services from alternative suppliers.¹⁶ The record, however, belies these statements with numerous examples of alternatives to ILEC special access services, both in terms of the actual supplier and the technology used. Embarq provided substantial evidence regarding the pervasive competition in its service areas, and the record is already clear on this fact. Accordingly, Embarq will not belabor the point with repetition. However, two points are worth specifically noting in these reply comments.

First, AT&T and Verizon own all or a majority of the two largest wireless companies in America. Both of these wireless companies, like Sprint Nextel and T-Mobile, require transport and backhaul to cell sites. In order to provide satisfactory service at a competitive price, neither of these companies will rely on inefficient

¹⁶ See e.g., Comments of Time Warner Telecom and One Communications, August 8, 2007 ("Time Warner Telecom") at pp. 5-18.

providers or unproven technologies. Likewise, Verizon and AT&T both have CLEC operations which, like CLECs such as PAETEC and Global Crossing, require backhaul services. Again, it would not be in their business interest to use inferior or inefficient inputs to these services. Therefore, it is extremely instructive that both AT&T and Verizon increasingly meet their special access needs from alternatives to the ILECs.¹⁷ AT&T pointed out: "AT&T, Sprint, and other cellular carriers, for example, are now obtaining thousands of DS1 circuits in remote locations and elsewhere from wireless broadband providers."¹⁸ AT&T also noted that FiberTower is an important supplier to AT&T Mobility,¹⁹ the company that recently announced it will provide wireless Ethernet backhaul services in seven of Sprint Nextel's initial WiMAX launch markets.²⁰

Second, several parties²¹ argue that WiMAX and other wireless alternatives are not yet a viable alternative. For instance, PAETEC argues that: "The *GAO Report* correctly made clear that any competition from non-wireline technologies in the special access market is a hope, not a fact:..."²² However, the now year old *GAO Report's*²³

¹⁷ AT&T at p. 20 and Verizon, Declaration of Cynthia Wells, ("In addition to purchasing backhaul services from third parties, Verizon Wireless also self-supplies its own backhaul in many cases. In some cases, Verizon Wireless uses microwave to provide backhaul services.... In Virginia, for example, approximately one-third of Verizon Wireless's total DS-1 equivalents used for wireless backhaul are supplied by Verizon Wireless itself using its own microwave facilities.").

¹⁸ Supplemental Comments of AT&T, Inc. at p. 8.

¹⁹ Id., at p. 17.

²⁰ <http://www.fibertower.com/corp/news-press-releases-080107.shtml>.

²¹ See e.g., Sprint Nextel at p. 29 and PAETEC at p. 16.

²² PAETEC at 16 citing the *GAO Report* at p. 41 stating: new technologies, such as WiMAX, also have the potential to bring more competition. However, it is unclear the extent to which this technology can provide a widespread alternative to wireline dedicated access,"²²

“hope” has fully ripened into “reality.” The fact that a major wireless carrier like AT&T purchases from FiberTower, coupled with the recent announcement of FiberTower providing services to Sprint Nextel proves the point in Embarq’s comments that “Changes in technology in the communications world have been fast and furious in recent years and have had a major impact on the availability of comparable alternatives and on ILEC behavior.”²⁴ Additionally, these developments also prove that the Commission’s predictive judgment was correct when it adopted special access pricing flexibility in the first place.²⁵

Indeed, the fact that Sprint Nextel is willing to use FiberTower as an alternative to ILEC backhaul is a testament to just how well it expects FiberTower’s alternative services to work. Sprint Nextel’s WiMAX play is being touted as the future of the company. As its Chairman and CEO, Gary D. Forsee, recently told shareholders:

We are confident that our WiMAX network will represent the true endgame to place us beyond any competitor in mobility. We’re designing

²³ Government Accountability Office, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report 07-80, (Nov. 2006) (“GAO Report”).

²⁴ Comments of Embarq, August 8, 2007 at p. 24.

²⁵ *LEC Price Cap Order* at ¶¶ 31-2 (“Opportunities presented by incentive regulation for enhancing efficiency in the LEC industry include the opportunity to provide better incentives for innovation. Innovation is not a term we define narrowly, as several parties do, to mean technological breakthroughs that lead to new services or offerings. [Citation omitted.] Our definition of innovation is far broader. Our definition incorporates innovation in management systems, administration, and in the multitude of what economists term “inputs” that are used to produce a firm’s output. In our view, innovation in how a company produces its output is one of the chief ways a company becomes more productive and efficient. ... Our view is that rate of return does not provide sufficient incentives for broad innovations in the way firms do business. Incentive regulation, by creating incentives for carriers to become more productive, generates powerful motives to innovate, and is a better way of regulating.”)

it to enable customers to communicate faster, more economically, and with greater convenience and enhanced multimedia service quality.²⁶

Given the importance Sprint Nextel obviously attaches to its WiMAX network, it is inconceivable that they would agree that alternatives to ILEC special access, such as provided by FiberTower, are "a hope, not a fact."

Additionally, FiberTower has been active, with some apparent success, in convincing Commission to allow even further innovations that will bring competitive pressures on ILEC special access. According to the August 13, 2007 Communications Daily,

FCC Chairman Kevin Martin late last week began circulating on the eighth floor an order approving a proposal by FiberTower to allow smaller antennas for 11-GHz transmissions. The proposal has raised interference concerns in the satellite industry, especially from Mobile Satellite Ventures. But supporters say use of the 2 foot antennas will help carriers expand their networks as they off 3G and 4G services, especially after the coming 700 MHz auction. The 11 GHz band, 10.7-11.7 GHz, increasingly sees use for wireless carrier backhaul. FiberTower asked the FCC to change its rules to allow the smaller antennas in a July 2004 petition for rulemaking. The FCC approved a rulemaking March 22. Commissioner Robert McDowell said at the time that the rule changes should mean more competition for backhaul as carriers expand networks.²⁷

Time Warner Telecom, after noting that it has deployed its own 21,000 route miles of fiber, of which over 13,000 route miles have been deployed in local metro networks,²⁸ then complains that it is unable to use cable companies as an alternative to ILEC special access because the cable company networks are mainly designed to provide cable modem services to residential and small business – not large carriers that utilize

²⁶ Gary D. Forsee letter to shareholders, http://media.corporate-ir.net/media_files/irol/12/127149/annual_meeting/Shareholdletter07.pdf.

²⁷ *Martin Circulates Order to Allow Smaller Antenna for Backhaul*, Communications Daily, August 13, 2007.

²⁸ Time Warner Telecom at p. 11.

ILEC special access. This complaint strains credibility. The fact that cable companies' extensive fiber networks deliver cable modem service to millions of residential and small business locations, does not in any way diminish those cable network's ability to use different available dark fibers within the same network to provide fiber based TDM and Ethernet services to larger business locations, most often located an economic distance away.²⁹

Time Warner Telecom's arguments are even more strained considering the information touted to shareholders in its notice of its annual stockholders meeting regarding its capacity agreement with two cable companies that clearly demonstrate that Time Warner Telecom sees cable companies as a viable alternative to ILECs.

Capacity License Agreements. We currently license fiber capacity from Time Warner Cable and Bright House Networks, LLC (a subsidiary of the Time Warner Entertainment-Advance/Newhouse Partnership between affiliates of our former Class B Stockholders that is managed by Advance/Newhouse), in 23 of our 75 markets. Each of our local operations in those markets is party to a Capacity License Agreement with the local cable television operation of Time Warner Cable or Bright House Networks, LLC (collectively the "Cable Operations") providing us with an exclusive right to use the capacity of specified fiber cable owned by the Cable Operations. The Capacity License Agreements expire in 2028. The Capacity License Agreements for networks that existed as of July 1998 have been fully paid and do not require additional license fees. However, we must pay certain maintenance fees and fees for splicing and similar services. We may request that the Cable Operations construct and provide additional fiber cable capacity to meet our needs. The Cable Operations are not obligated to provide such fiber capacity and we are not obligated to take fiber capacity from them. As we expand our operations to markets not served by Cable Operations, we will be required to obtain fiber capacity from other sources. If the Cable Operations provide additional capacity, we pay an allocable share of the cost of construction

²⁹ Verizon at pp. 38-9 ("As the report [*GAO Report*] acknowledges (at 26), once CLECs have deployed fiber *networks* in an area, CLECs are able cost-effectively to extend those networks to serve customers in individual *buildings* where there is sufficient demand.").

of the fiber upon which capacity is to be provided, plus a permitting fee. If we obtain our own rights-of-way or franchises in the service areas covered by the Capacity License Agreements and have excess fiber capacity, the Capacity License Agreements provide for us to negotiate a license of capacity to the Cable Operations in good faith.³⁰

Even in markets where competition has not fully developed, Embarq pointed out that these markets are still contestable and that “When a market is *contestable* ‘the possibility of entry by new firms can greatly constrain the exercise of monopoly power...the threat of entry, as well as actual entry, can have a significant impact on the pricing behavior of firms.’”³¹ Verizon also noted the same basic economic principle:

Accordingly, the fact that CLECs may not yet have built out to particular buildings with high-capacity demand ignores the fact that they readily could do so in many cases – and the prospect of such competition provides an additional check on special access rates.³²

Existing market forces are more than sufficient to sustain the abundance of existing competition and to encourage even more competition. Reversing course now from the deregulatory path charted by the Commission in the existing system of special access regulation by artificially setting prices and imposing pricing constraints would be

³⁰ Time Warner Telecom, Notice of Annual Meeting of Stockholders [June 6, 2007], http://www.twtelecom.com/Documents/Announcements/Financial_Docs/2006_Proxy.PDF.

³¹ Embarq at p. 25 citing Browning and Zupan, *Microeconomic Theory and Applications*, Addison-Wesley, 1999 (Sixth Edition) at 290-92.

³² Verizon at p. 39. *See also*, Comments of Qwest Communications International Inc., August 8, 2007, at p. 13 (“First, the Commission has recognized, in the special access context and elsewhere, that existing deployment demonstrates that other competitors can feasibly enter a market – or other, similar, markets – even when they have not yet done so. In *USTA II*, the D.C. Circuit had criticized the Commission’s failure to account adequately for such potential competition. [Citation omitted.] The Commission responded to this criticism in the *TRRO*, adopting “an approach that relie[d] ... on the inferences that can be drawn from one market regarding the prospects for competitive entry in another...”

bad public policy and fully opposite to the Telecommunications Act's express direction to the Commission to "promote competition and reduce regulation"³³

III. THE RECORD IS NOT AND CANNOT BE COMPLETE, UNTIL THE COMMISSION RECEIVES DATA FROM ALL PROVIDERS.

As demonstrated above and in the previous comments of Embarq and other ILECs (including those filed in 2002 and 2005), the record has more than enough evidence of competition to ILEC special access. Moreover, there is considerable evidence that special access rates are just and reasonable. Consequently, claims that there is a lack of competitive alternatives must be rejected. Indeed, if the Commission does require competitors and purchasers to provide information regarding facilities, the record will be even more convincing of robust competition. Embarq agrees with the *GAO Report's* call for more data. A more complete record will assist the Commission in continuing down the deregulatory path it started with the *LEC Price Cap Order*.

Unfortunately, the *GAO Report* has become a major part of the dispute in the special access debate; in fact, ILECs, CLECs, and wireless carriers all point to the *GAO Report* for support. One thing is clear, however, from the face of the *GAO Report* itself—the document simply does not provide any support for changes in the current system of pricing flexibility. The *GAO Report* recommends, *and only recommends*, that the Commission needs to collect better and more data from ALL parties, not just ILECs:

We are making recommendations to FCC to revisit the issues it initiated in its rulemaking proceeding on dedicated access and to develop measures and methods to monitor competition on an ongoing basis that more accurately represents market developments and customer choice. We

³³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (Introductory Statement).

provided copies of the draft report to FCC for its formal comment. FCC did not disagree with the facts presented in the report but contended that the report implied a need for regulatory price controls and consequently disagreed with the recommendations. **Counter to FCC's interpretation, the report does not call for the reregulation of dedicated access prices. Instead, the report concludes that in order to better meet its regulatory responsibilities, FCC needs a more accurate measure of effective competition and needs to collect more meaningful data.**³⁴ [Emphasis supplied.]

Not only has the Commission not collected the necessary data, but none of the competitive providers, e.g., cable, CLEC, wireless (fixed and mobile), WiMAX, and interconnected VoIP, have voluntarily provided any data about their network and facilities deployment. Indeed, not only have competing providers and purchasers refused to provide any data regarding the location of competitive special access facilities; they claim that such information is not a necessary part of a record upon which to impose re-regulation or oppressive new regulation,³⁵ a claim that clearly flies in the face of the *GAO Report's* recommendation.

Embarq urges the Commission to gather information about network capabilities and location from all companies that own or lease facilities and provide transport or connections to end user premises, including cable, CLEC, wireless (fixed and mobile), WiMAX, and interconnected VoIP and all purchasing of special access services. Ideally, companies would file coverage maps, broken down to granular, yet coherent units. For example, wireline telecommunications networks would be displayed on a wire center basis, and commercial mobile radio service networks on a switch tower basis.

³⁴ Id., at p. 15.

³⁵ E.g. PAETEC at pg. 15.

As noted above, this additional data is not needed to confirm that the special access market is robustly competitive and ILEC special access prices are reasonable, having been directed by competitive market forces. Rather, the additional data is necessary to provide the Commission the information it needs to further deregulate ILEC special access; to finish the deregulatory process started with the *LEC Price Cap Order*.

**IV. THE SERVICE ABOUT WHICH THERE ARE THE MOST COMPLAINTS—
DS1 CHANNEL TERMINATIONS—ARE NOT EARNING EXCESSIVE
RATES OF RETURN.**

The bulk of complaints in the record from special access purchasers revolve around the smaller high capacity services, such as DS1 channel terminations—links between end offices and customer locations such as cell towers and business offices.³⁶ This also appears to be the principal focus of Chairman Markey in his letter to Chairman Martin and the Commissioners.³⁷ Significantly, Embarq's rates for DS1 channel terminations—the object of most of the complaints for lower rates—are sold *below economic cost* as measured using the total service long run incremental cost (TSLRIC) methodology. In fact, Embarq's rates for DS1 channel terminations of greater than three miles are so far below economic cost to cause Embarq's overall returns on DS1 channel terminations of all types to be below its economic cost overall. Accordingly, not only

³⁶ E.g., Sprint Nextel Comments at 3; Ad Hoc Users Comments at 13-14. There are few complaints in the record about prices or conditions for the larger high-capacity services, such as fiber rings and OCx links. Accordingly the Commission can only conclude that there is sufficient competition for these services and no changes are needed to current regulation.

³⁷ Letter dated May 23, 2007 from Edward J. Markey, Chairman, House Subcommittee on Telecommunications and the Internet, to Chairman Martin, Commissioner Copps, Commissioner Adelstein, Commissioner Tate, and Commissioner McDowell, Federal Communications Commission, available at <http://markey.house.gov/docs/telecomm/Letter%20to%20FCC%20Commissioners%20re%20special%20access%20052307.pdf>.

does the Commission lack any record basis for reducing these rates, it would be confiscatory to do so. Indeed, as demonstrated in the Dickerson Declaration (Attachment A), Embarq actually needs to charge *higher*, not lower, rates for DS1 channel terminations.

Special access purchasers admit in their comments that it is expensive to build DS1 circuits and they offer no evidence why it should be any cheaper for an ILEC to build those dedicated circuits. Embarq agrees that it is expensive. Embarq has developed sophisticated cost modeling tools which allow for very granular (down to a customer address level) cost analysis of discrete components of the network and associated services, including the cost of connections between its central offices and end user customer locations, commonly called loop connections.

Using this cost analysis as more fully described in the Dickerson Declaration (Attachment A), Embarq prepared the attached confidential exhibit (Exhibit KWD-1) which analyzed the Returns on Investments for DS1 Channel Termination-- the very DS1 Channel Terminations to wireless tower locations that are at the heart of this NOI-- for its largest three operating areas i.e. Florida, North Carolina, and Nevada.³⁸ This analysis shows that the DS1 Channel Termination rate band greater than 3 miles does not recover its cost and that it also causes the overall average for all DS1 Channel Terminations to customer premises outside the central office to earn below their economic cost of service. This is instructive because it is these DS1 Channel Terminations which Wireless Carriers commonly purchase to connect to their wireless tower locations. Thus Embarq's analysis shows that the "overearnings" allegations regarding DS1 Channel Termination

³⁸ Attachment A.

connections to wireless tower locations are in fact just plain wrong with respect to Embarq. Instead, cell tower channel terminations are, in fact, an under-earning service segment within the overall special access services. Accordingly, if the Commission were to take any action on Embarq's prices, it would have to allow for price increases for the greater than 3 mile distances which are currently priced below their reasonable and efficient forward-looking costs. Any other action would be confiscatory and violate the mandates of the Communications Act.

Equally instructive is the attached analysis of special access rates to the overall costs to construct cell sites. Sprint Nextel and T-Mobile contend that BOC and ILEC special access rates, respectively, inhibit their construction of cell sites and thus broadband deployment. To the contrary Embarq's analysis shows that the pricing of special access has only a negligible, impact on the availability of, and investment in new wireless networks. Thus, the allegations that special access pricing, particularly the pricing of Special Access Channel Terminations providing connections to wireless network tower locations, presents a substantial deterrent to establishing more wireless tower locations are simply not credible.

Although the cost to construct new wireless tower locations varies, it can be reasonably estimated to range from a low of approximately \$400,000, to amounts much higher, depending on site acquisition costs and fees, as well as traffic volumes that impact electronic equipment requirements and costs. The often advanced suggestion that the relative operating costs (including capital recovery, cost of capital, and maintenance) of these large investments are so adversely affected by the much smaller lease costs of Special Access Channel Terminations so as to inhibit their construction, is simply not

believable. Rather when the true operating cost of a wireless tower location is properly reflected, the monthly cost of leased special access circuits is reasonably estimated to range from only 2%-7% of the total cost for most sites.³⁹

While certain wireless carriers would undoubtedly be happy to receive a rate decrease on any input, including Special Access Channel Termination rates, the Commission cannot reasonably conclude that such a rate decrease would lead to new wireless tower build-outs relative to the overall economics of those same potential build-outs. It is a hollow promise, as demonstrated by the economic analysis.

V. REINITIALIZATION OF ANY SPECIAL ACCESS RATES BASED ON THIS RECORD WOULD BE UNLAWFUL AND BAD PUBLIC POLICY.

Several commenters argue that special access rates should be reinitialized. These arguments take several forms. BT Americas seeks the reset of special access rates at Long Run Incremental Cost ("LRIC") with subsequent adjustments using a productivity adjustment and earnings sharing component.⁴⁰ On the other hand, Sprint Nextel argues that the rates for the largest BOCs in Phase II pricing flexibility markets should be reduced to the tariff rates in existence when the offerings were still under price cap regulation and that the price cap indices for the largest BOCs be recalculated as if an X-Factor of 5.3% had been in existence for July 2004 through July 2008, and then applied going forward.⁴¹ None of these suggestions are supported by the record.

³⁹ Attachment A.

⁴⁰ Comments of BT Americas Inc. ("BT Americas") at p. 21.

⁴¹ Sprint Nextel at p. 7. All of the relief sought by Sprint Nextel was targeted at the largest BOCs. Smaller ILECs like Embarq were not included. *See also*, Comments of Global Crossing North America, Inc. at p. 4, which notes, with approval, that "many parties advocate a return to full price cap regulation for special access services."

As previously noted, nothing in the record demonstrates that any of the existing rates for any special access services are unjust and unreasonable, let alone that all of such rates are unjust and unreasonable.⁴² Absent a record to sustain such a finding, any re-initialization of rates, as Iowa Telecommunications points out

would be contrary to the Act: the agency previously explained that Section 205(a) precludes rate prescription absent "a finding that current rates are or will be unreasonable," and there is no evidence that special access rates are, or will be unreasonable.⁴³

Additionally, any re-initialization of rates would be bad public policy.

Competition and further deployment of facilities will not occur where rates are arbitrarily lowered (especially rates such as Embarq's DS1 rates which as demonstrated in the Dickerson Declaration (Attachment A) are reasonable and, in certain cases, already too low. Embarq believes AT&T made this point very well in their comments:

As AT&T and others previously demonstrated, there is no basis for any attempt to reinitialize or re-impose price caps on special access services. In the absence of any showing that current rates are systematically unjust and unreasonable, such re-regulation would only punish LECs for responding to the incentives provided by the price cap regime to invest in advanced facilities and to become more efficient, and it would consign the

⁴² The lack of such evidence led the Commission, among other reasons, to refuse the interim relief requested by legacy AT&T's 2002 petition for rulemaking in docket RM-10593. See, e.g., *Special Access Rates for Price Cap Local Exchange Carriers, A&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, 20 FCC Rcd 1994 (2005) ("Special Access NPRM") at ¶ 130 ("Furthermore, even assuming that AT&T had established a strong likelihood that we would reverse or modify the findings of the *Pricing Flexibility Order*, the request for a re-initialization of certain special access rates to levels that would produce an 11.25 percent rate of return has not been justified. Specifically, the record does not support a finding that every special access rate established pursuant to a grant of Phase II pricing flexibility violates section 201 of the Communications Act. [Citation omitted.] In addition, we find the record inadequate for prescribing new special access rates pursuant to section 205 of the Communications Act.")

⁴³ Comments of Iowa Telecommunications Services, Inc. at p. 33 citing to the *LEC Price Cap Order* at ¶ [2]53.

Commission and the industry to endless litigation that has no hope of ultimately providing either special access purchasers or consumers any concrete benefits over the current regime.⁴⁴

VI. THE RECORD DOES NOT SUPPORT THE RE-IMPOSITION OF A PRODUCTIVITY FACTOR.

Despite the fact that certain parties asked the Commission to reinstate a productivity factor, no new evidence of any accuracy was placed in the record that would indicate such a move was warranted.⁴⁵ Sprint Nextel, in particular, argued for a re-imposition of a 5.3% X-factor "pending the Commission's adoption of an updated factor."⁴⁶ However, Sprint Nextel attempted to justify its argument by providing an updated version of a previously-submitted productivity study which, upon investigation, cannot be relied upon to produce accurate results.

With regard to this study, Embarq's initial comments in this proceeding provided an economic explanation of why it is not possible to calculate an accurate productivity factor for special access alone. Specifically, the nature of the telecommunication production process does not allow for an accurate measure to be calculated. The telecommunications production function is not "separable" which means that it is impossible to clearly identify when changes to an input are associated with one output or another output. This absence of "separability" has been acknowledged by other economists in this proceeding, notably Dr. William Taylor writing for Verizon.⁴⁷ If, despite this lack of separability, an attempt is made to calculate productivity for special

⁴⁴ AT&T at p. 32.

⁴⁵ Ad Hoc Comments at p. 25; T-Mobile Comments at p.14; Sprint Nextel Comments at p.7.

⁴⁶ Sprint Nextel Comments at p. 7.

⁴⁷ AT&T at p. 43, footnotes 92 and 93.